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Judicial Control over Legislation in Australia

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BY

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I HEREBY RECOMMEND THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

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C O N T E N T S.

INTRODUCTION.

On the 17th of September, 1900, the Queen of Great Britain by a proclamation declared that the people of the Colonies of New South Wales, Tasmania, Victoria, Queensland, and West Australia and the province of South Australia, should be united in a Federal Commonwealth under the name of "The Commonwealth of Australia"; and on the first of January, 1901, the day appointed by the proclamation, the constitution of the Commonwealth took effect, in accordance with the terms of the Act of the Imperial Parliament, known as the Commonwealth of Australia Constitution Act of 1900 (1).

The mode in which the Commonwealth came into being leaves no room for doubt or speculation as to the origin or legal foundation of the Commonwealth and its constitution. The establishment of the Commonwealth is no "Act of State" transcending the limits of legal inquiry; it is an act of law performed under the authority of an acknowledged political superior. The constitution is first and foremost a law declared by the Imperial Parliament to be "binding on the courts, judges, and people of every State and every part of the Commonwealth". In the Commonwealth the legal basis of the Union makes it possible to acknowledge frankly the agreement behind it. The people do not pretend to ordain and establish, as they did in the American union; they have as a people of the several colonies "agreed to unite", and in the making of that agreement the most scrupulous care was taken to make the popular participation a reality

(1) 63 & 64 Vict. c, 12. (For Act and Proclamation see Chitty's Statutes, vol 14, p. 116.) (5th Edition)

and not a fiction. The Commonwealth, being a union of the people and not of their governments, is no mere confederacy. The emphasis of "the people", then, in the preamble and sec. iii, indicates the democratic origin of the Commonwealth and foreshadows the nature of its constitution.

In accordance with the preamble and sec. iii of the Act, the Queen's Proclamation declares that the people shall be united in a Federal Commonwealth, and that term is repeated in the designation of the several organs -- legislative (sec.1), executive (sec.62), and judicial (sec.71) -- of the new government. This serves to bring out the fact that the new nation is primarily, and was at its foundation exclusively, a commonwealth of commonwealths, of existing political communities; and that the constitution is founded upon the assumed continuance of those communities is indicated in the distribution of powers between the Commonwealth and the States, and in the machinery for altering the constitution.

But the study of any federal government leads us to consider, to some extent at least, the details of its organization. The following, from this point of view, are the leading features in the Federal Commonwealth of Australia:-

(1). The Commonwealth is founded of communities which were, at the time immediately preceeding the union, practically separate and independent in their relations to each other.

(2). The Commonwealth government is a government of limited

and enumerated powers; and the parliaments of the States, continuing under the Imperial Acts which granted the constitutions to the provinces, retain the residuary power of government over their territory.

(3). The Commonwealth and State governments are each organized separately and independently for the performance of their functions, whether legislative, executive, or judicial. But the Commonwealth and State governments, although separately organized, must be regarded as constituting a unit.

(4). The legislative powers of the Commonwealth Parliament are not in general exclusive powers. A few of the exclusive powers are expressly conferred by the terms of constitution on the Federal Parliament; the exclusiveness of others arises from the fact that some of the powers conferred upon the Commonwealth Parliament were not derived from the existing powers of the colonies. The general relation of the concurrent powers of the Commonwealth and State Parliaments is fixed by the provision in the Constitution Act that, in case of inconsistency, the law of the Commonwealth prevails, and the law of the State is, to the extent of the inconsistency, invalid (sec. 109 and introductory clause 5).

(5). Subject to what has been said in (4) the Commonwealth and State governments are distinct in their spheres of authority and power. This is not to say that the respective governments do not owe certain duties to each other, or that the state or some

of its organs may not be, in some cases, the instrument of the Commonwealth government.

Legislation by the British Imperial Parliament is not subject to be reviewed and annulled[1] by any court of law within the realm. Parliament itself, in its collective capacity, is the highest court in the kingdom, and is necessarily the supreme judge of the proper limits of its jurisdiction and powers; and it is not either constitutional or lawful for any inferior court to question the propriety or the discretion of any act done or passed by the Imperial Parliament.

Within the limits of every colony or province of the British Empire having representative institutions, the local legislature has like supreme authority and jurisdiction, subject, however, to the determination of the question whether the legislature, in passing any act, has exceeded the powers granted to it and which it exercises as a subordinate legislative body. For the powers of the legislature of the self-governing colonies -- in contradistinction to those of the Imperial Parliament -- are defined and limited, and are prescribed by a constitution that is written. It is a further condition of all legislation by subordinate and provincial assemblies throughout the Empire that the same shall not be repugnant to the law of England. These conditions, before the establishment of the self-governing colonies, were enforced in two ways: first by the power of the

Crown to disallow any Act that contravened these principles; second, by the decision of the Privy Council, upon any action or suit of law, duly brought before such tribunal, to declare and adjudge a colonial or provincial statute, either in whole or in part to be ultra vires and void, as being in excess of the jurisdiction conferred upon the legislature by which the same was enacted, or at a variance with some Imperial law in force in the colony; or otherwise by a similar decision to confirm and approve the legality of the act, the legality of which has been impugned. The power of interpreting all colonial statutes, and the determination of their constitutionality or validity then rested ultimately with the Privy Council.

The wisdom of retaining such jurisdiction of the Privy Council has not gone unquestioned in recent years; doubts have been fully expressed of its competence to deal satisfactorily with complicated questions of colonial law brought before it, and stress has been laid on the desirability of having a local tribunal settle ~~questions of~~ local points of law. Emphasis has been laid in reply on the advantages of having a neutral tribunal to decide matters which may raise great political feeling in the colony, and further on the desirability of preserving a general uniformity of law throughout the Empire.

These theoretical arguments in favor of retaining an appeal to the Privy Council, however, were not accepted by the framers of the Australian Constitution, and in the shape in which

the Australian Constitution Bill was presented to the British government every question affecting the interpretation of the constitution was withheld from appeal to the Privy Council, save where the public interest of some other part of the Empire was involved (1).

In December, 1899, Mr. Joseph Chamberlain, Secretary of State for the Colonies, expressed his hope that a delegation from the federating colonies would visit England and be present when the Commonwealth Bill was introduced in the Imperial Parliament. These delegates arrived in London on March 15, 1900, and had their first informal conference with the Secretary of State for the Colonies and the Crown Law Officers. Here it was indicated by the Attorney General of the Empire that some of the provisions of the Bill required discussion and explanation, and perhaps amendment. The chief objection made was to clause 74 of the proposed Bill, restricting the right of appeal to the Privy Council. It was evident at the outset that, while the delegates were anxious to secure the passage of the Bill without amendment, the British government was equally anxious to amend certain provisions which seemed to them to affect Imperial inter-

(1) The main portion of this clause of the Constitution Bill as finally amended in the constitutional convention and submitted to the Imperial government read as follows: "No appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this constitution, or of the constitution of any state, unless the public interests of some part of Her Majesty's domains, other than the Commonwealth or a State are involved".

ests. A memorandum of the amendments suggested by the Crown Law Office was later handed to the Delegates. These amendments, five in number, were wholly confined to the introductory clauses of the Bill. In the first and chief of these it was proposed, as regards Privy Council appeals, to modify the effect of clause 74 by adding to the introductory clauses a declaration that nothing in the Act or Constitution should effect any prerogative of the Crown to grant special leave of appeal from the High Court or any State Supreme Court to the Privy Council.

On March 23, preliminary to any further conference with the Secretary of State for the Colonies, the delegates forwarded to him a memorandum, stating at length their reasons for urging the passage of the Bill in the form in which it had been affirmed by the people. In answer to that of the delegates, the Imperial Government prepared a memorandum, setting forth their objections to some of the provisions of the Bill, and again laid emphasis on the desirability of retaining the power of appeal from the colonial courts to the Privy Council.

After exchanging several more memoranda, which contained nothing more than elaborations of the arguments that had previously been presented, the Bill was introduced into the House of Commons on May 14, 1900. The Bill as introduced differed from the draft of the Convention in that section 74 was entirely ommitted, and to the introductory clause 5 the following words were added: "notwithstanding anything in the constitution set

forth in the schedule to this Act, the prerogative of Her Majesty to grant special leave to appeal to Her Majesty in Council may be exercised in respect to any judgment or order of the High Court of the Commonwealth or of the Supreme Court of any State".

To meet the pretests of the delegates, Mr Chamberlain later offered to substitute for the first clause of section 74 a new clause, the object of whose provisions was to make the decision of the High Court final on questions as to the limits of the Federal and State powers inter se, unless both parties to the suit -- or, if the parties were private citizens, the governments whose powers were effected -- desired an appeal.

The delegates, at their own request, were authorized by their governments to secure the nearest approach possible to the original Bill; and as this was offered by Mr Chamberlain as the utmost limit of concession, they expressed their approval of it, subject to possible verbal improvements. In England the amendment met with favor, and much gratification was expressed at Mr. Chamberlain's announcement of a settlement.

In Australia, however, the suggested compromise was received, first with hesitation and then with distinct disapproval, both the form and the policy of the new clause being condemned. They insisted that in cases between private suitors, in which constitutional points arose, a party's right to appeal ought not to be made dependent on the consent of the executive

government of his state or of the Commonwealth. In all the Colonies it was forcibly urged that the interference of the political with the judicial department would be fraught with danger.

Meanwhile to remove ambiguities and meet some of the criticisms, the first part of the clause was redrafted. The verbal improvement, however, did not meet the main objections to the proposed clause, and on the 14th of June, 1900, the Premiers of the southern colonies sent a joint telegram to Mr Chamberlain, stating that the opinion throughout Australia was much opposed to subjecting the right of appeal to the consent of the Executive Governments. They urged that the Bill be passed without amendment.

It was suggested simultaneously in England and Australia that the leave of the High Court be substituted for that of the Executive Councils. In a consultation with the delegates, Mr. Chamberlain resolved to make this concession and offered clause 74 as it now stands in the constitution (1). In the committee of the whole, Mr. Chamberlain moved the ommission of the words which had been inserted in the introductory clause 5 to save the prerogative of appeal in all cases. This motion was

(1) The principal clause of sec.74 as it now stands reads as follows: "No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council".

carried, and after some further discussion the Bill passed the House. Although the Bill was not accepted as entirely satisfactory in the House of Lords, it was carried without amendment, and on the 9th of July received the royal assent.

The High Court as thus provided by the constitution is the crown and apex, not only of the judicial system of the Commonwealth, but of the judicial systems of the States as well. It is in the first place a court of original jurisdiction in certain enumerated matters of especially Federal concern (sec.75), and this jurisdiction may be extended by Federal legislation to cover certain other enumerated matters of especially Federal concern (sec.76). In the next place it is a court of appeal from Federal courts exercising federal jurisdiction, this appellate power being conferred as to those subjects in which the High Court may be invested with original jurisdiction -- that is, to the matters enumerated in sections 75 and 76. In the third place, the High Court is a court of appeal from all decisions of the Supreme Courts of the States, utterly irrespective of the subject matter of the suit and the character of the parties. In this respect it resembles the Supreme Court of Canada and differs from the Supreme Court of the United States.

We have thus seen the basis upon which the courts of Australia were founded and their relations to each other as provided by the Constitution of the Commonwealth.
But a series of events soon followed that tested not only the

constitutional basis and legal relations between the courts themselves, but the enactments of the several parliaments as well. This series of events involved two fundamental and far reaching questions: (1). Shall the High Court be the final court of appeal in constitutional questions involving a conflict between State and Federal powers; and (2), Shall the High Court exercise a power of supervision over the enactments of the Federal Parliament? The development and solution of these questions will be taken up in the remaining portion of this paper.

CONTROL OVER STATE LEGISLATION.

In 1902 the legislature of the State of Victoria passed an income tax law which provided for a tax rate on all incomes over a specified amount. This gave rise to Wollaston's Case (1) where a Federal officer contended that his salary as a Federal officer was exempt from State taxation, basing his suit on the argument brought forth by Chief Justice Marshall in the American case, McCulloch v Maryland (2). The Supreme Court of Victoria refused to follow the decision in the American case, and held that a Federal officer was bound to pay to the State a tax on his salary as a Federal officer. This court was of the opinion that even if McCulloch v Maryland did apply in Australia, the case at hand was one which did not warrant its application. The Chief Justice of the Supreme Court of Victoria took the ground that the doctrine established in McCulloch v Maryland was forced upon the Supreme Court of the United States by political necessity because of the evils which would necessarily follow such abuse of power by the independent authorities, and that there was an essential difference between the American constitution and any existing constitution under the crown of Great Britain; a difference recognized by the Privy Council when, in Bank of Toronto v Lambe (3), it refused to apply the doctrine of

(1) (1902) Victorian Law Reporter 57. (Cited from Moore, Commonwealth of Australia, 2nd ed. p. 423)
(2) 4 Wheaton 316.
(3) 12 Appeal Cases 575.

of McCulloch v Maryland, as between the Dominion and the Provinces of Canada. In the words of the Judicial Committee of the Privy Council: "The power of disallowance by the Imperial Government of any legislation of a self-governing State within the Empire which might be likely to subvert either its own constitution or the constitutional existance or authority of any other such State, or the Imperial Government, or which is calculated to conflict with the interest of the latter, is regarded by the Privy Council as an all-sufficient safeguard against a probability of the happening of the evils which Chief Justice Marshall desired to guard against, because no such safety valve existed under the condtitions in which the American case arose and exists". As an appeal was not taken in Wollaston's Case from the Supreme Court of Victoria to the Federal High Court, the conflict between the Federal and State powers was not terminated.

Although Wollaston's Case did not reach the High Court, the principle involved reached this Court in 1904 in the case of D'Emden v Pedder (1). A Tasmanian statute provided that every receipt for sums of money over 5L and under 50L should bear a duty stamp of 2d. The question was raised whether this enactment did and could apply to receipts given by a Federal officer in accordance with the Federal Audit Act which requires every Federal officer to give a receipt for the salary paid to him as such officer. The High Court here, reversing the decision of the Supreme Court of Tasmania, adopted the argument used by

(1) 1 Commonwealth Law Reports 91.

Chief Justice Marshall in McCulloch v Maryland. It was held that the power of the State to tax Federal instrumentalities gave power to the State to destroy the Federation, and that the case at hand, for this reason, was contrary to the fundamental principles of the Commonwealth constitution, and hence could not be tolerated. The High Court in this case, when it declared the law of a State unconstitutional, exercised for the first time the power granted to it by section 74 of the constitution to determine the limits inter se of the constitutional powers of the Commonwealth and those of any State or States; and applied for the first time the provisions of the constitution providing that when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be void (1), interpreting these provisions to mean that State enactments contrary not only to the actual Federal enactments but endangering the general welfare of the Commonwealth were void.

Although the High Court had given this decision, the State legislatures still continued to pass income tax laws applicable to Federal officers, and the State courts were still loath to follow the decision rendered by the High Court, concerning this question, in D'Emden v Pedder. On account of this position taken by the State Supreme Courts the same principle took new form, on November 4, 1904, in the cases of Deakin v

(1) Introductory clause 5 and section 109.

v Webb and Lyne v Webb (1), which arose out of the decision of the Supreme Court of Victoria (2) holding the salary of Federal officers liable to the State income tax. The High Court reasserted the principle established in McCulloch v Maryland as it had previously done in D'Emden v Pedder. It asserted that the Commonwealth and the States were, with respect to matters which, under the constitution, were within the bounds of their respective legislative and executive authority, sovereign States, subject only to the restrictions imposed by the Imperial connection and provisions of the constitution, either expressed or implied. "When therefore the constitution makes a grant of legislative or executive power to the Commonwealth, the Commonwealth is entitled to exercise that power in absolute freedom, and without any interference of control whatever except that prescribed by the constitution itself. If a State attempts to give its legislative and executive authority a power which, if valid, would interfere to the smallest extent with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized, is invalid and inoperative". It further asserted in respect to the American case of McCulloch v Maryland that in interpreting the Commonwealth constitution it was reasonable to infer that where the framers of the instrument inserted provisions indistinguishable in substance though varied in form from the provisions of other

(1) 1 C.L.R. 585.
(2) 29 V.L.R. 748. (Cited from Moore, Commonwealth of Australia, 2nd ed. p. 426.)

well known constitutions which have received judicial interpretation, they intended that such provisions should receive like interpretation. The court then adopted the principle that general words in a State statute should, if possible, be so construed that the application of the Act will not infringe the Commonwealth constitution. Interpretated in this light it was held that the income tax did not apply to the salary of Federal officers. It is interesting to note here that the High Court so interpretated the statute as not to make it invalid, yet its view clearly indicated that it considered itself the judge of the constitutionality of State legislation.

Under section 74 of the constitution a petition was then presented to the High Court asking for a permit to appeal to the Privy Council, but such certificate was refused. The extent of public interest in the matter and the desire of the State governments to obtain a final decision of the matter by the Privy Council were treated as irrelevant. Justice Barton adverted to the history of this section and asserted that the section was "designed in the first place to safeguard the right of the people who had framed it and had voted upon it, to interpret it and bring to an end conflicts between the Commonwealth and the States by the decision of the court which the constitution was calling into existance, and in the same way to deal with causes which arose between two or more states, because, in respect to the new self-governing powers, constitutional

conflicts between two States came within the category of local affairs. Primarily then it was intended that this court should take the responsibility of deciding the class of questions of which that now before the court is one". Justice O'Conner was so strongly impressed by the nature of the responsibility cast on the court that he had no hesitation in saying (1) that if it were found that, by a current of authority in England, it was likely that, should a case go to the Privy Council, some fundamental principle involved was likely to be decided in a manner contrary to the true intent of the constitution, as the court believed it to be, it would be the duty of the High Court not to allow the case to go to the Privy Council, and thus to save the constitution from the risk of what the court considered a misinterpretation of its fundamental principles.

By the interest shown by the States in the cases of Deakin v Webb and Lyne v Webb it was manifest that the States were by no means satisfied with the decision rendered by the body from which they desired an appeal. Fundamentally the same principle as that involved in Deakin v Webb and Lyne v Webb was brought before the Supreme Court of Victoria in 1905 in the case of Webb v Outtrim (2). Here again a Federal officer was suing for exemption from the State income tax. In this case, however, the Supreme Court of Victoria, in deference to the decision of the High Court in Deakin v Webb, decided that a Commonwealth

(1) 1 C.L.R. 585 at page 630.
(2) (1905) V.L.R. 463. (Cited from Moore, Commonwealth of Australia, 2nd ed. p. 213.)

officer resident in Victoria, where he earned and received his salary as such officer, was not liable to assessment under the income tax of Victoria. An application was immediately made for a permit from the Supreme Court of Victoria to appeal directly from this court to the Imperial Privy Council. Chief Justice Hodges of the State Supreme Court argued that there was no provsion in the Commonwealth Constitution Act taking away the right of the Supreme Court of Victoria to grant leave to appeal directly to the Privy Council, and an appeal was granted to that body by the full court.

The case reached the Privy Council May 18, 1906 (1). The Commonwealth immediately sent a petition asking the case to be dismissed on the ground of incompetency of the Supreme Court of Victoria to grant an appeal to the Privy Council. The petition of the Commonwealth was based on the ground that section 74 of the constitution expressly constituted the High Court as the final arbiter of the law in the class of matter to which this case belonged, except so far as the High Court should permit the matter to be dealt with by the King in Council, and that as no permit to appeal had been granted by this court, but by a court which had no right to grant the permit, the case should not be heard by the King in Council.

The Privy Council in deciding this matter of appeal held that the right of appeal from the State Court to the King

(1) 1907 Appeal Cases 81.

in Council was governed by charters, orders in Council under statutory power, and, in some cases, by local statutes. These might be recalled or varied only by the Imperial Parliament or the several authorities from which they issue. It was suggested that the only basis upon which the objection could be founded was the Commonwealth Act, and no direct authority under that Act could be shown. The Court then accepted the view taken by Chief Justice Hodges when the same question was raised in the Supreme Court of Victoria, and further endorsed the view by saying that "if the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from the decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, we should have felt no doubt that such an Act was outside the power of the Federal Legislature, and, in our opinion, it is outside their power to do that very thing in a round-about way". It was to have been expected that the Privy Council would take this position on this question of appeal. It will be remembered that in the amending and passing of the Constitution Bill, the Imperial Government strove very vigorously to retain the power of appeal from the Commonwealth High Court to the Privy Council, and yielded this point to the colonies after much resistance and with great reluctance. It did recognize, however, that there

remained a possibility of appeal from the State Supreme Courts directly to the Privy Council (1). Although it was recognized, no action was taken on the matter at that time. As the state of affairs at hand opened up an avenue of escape, to some extent, from the agreement that no appeal should be permitted to the Privy Council from the High Court, and presented, in a measure, an opportunity to regain the point conceded, the Privy Council, it seems, did not hesitate to take advantage of the situation.

The question of appeal having been settled, the Court gave its opinion as to the legal question invilved. Here another conflict arose between the judgment of the High Court and the opinion of the Privy Council. The latter court in summing up the arguments of the plaintiff, which were based on the decision of the High Court, said: "It is not contended that this restriction on the powers of the Victorian constitution is enacted by any express provision of the Commonwealth Act, but it is argued that, in as much as the imposition of the income tax might interfere with the free exercise of the legislative or executive powers of the Commonwealth, such interference must impliedly be forbidden by the constitution of the Commonwealth, although no such express prohibition could be found therein". This argument, though first employed by Chief Justice Marshall in the Maryland Case, had been adopted by the High Court in the case of Deakin v Webb. The Privy Council held, however, that

(1) See infra, pages and

the reasoning of Marshall in the American case did not apply in Australia. As to the analogy drawn by the Chief Justice of the High Court in Deakin v Webb, this court said: "The analogy fails in the very matter that is under debate. No State in the Australian Commonwealth has the power of independent legislation possessed by the States of the American union. Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an act of Parliament, as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the colony, it might be inoperative to the extent of its repugnancy (1) but with this exception, no authority exists by which its validity can be questioned or impeached". The Privy Council thoroughly agreed with the Chief Justice of the High Court, Griffith, in D'Emden v Pedder when he said that "when a particular form of legislative enactment which has received authoritative interpretation, whether by judicial decision or long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the legislature to bear a meaning which had been put upon them..... When, therefore, under these circumstances we find embodied in the constitution provisions indistinguishable in substance though varied in form from the constitution of the

(1) See Colonial Laws Validity Act of 1865.

United States, which have long since been judicially interpreted by the Supreme Court of the Republic, it is not an unreasonable inference that its framers intended that like provisions should have like interpretation." This reasoning held to be good if applicable was rejected as inapplicable by the Privy Council because of the fact that the Judges on the Bench could not, and the Chief Justice of the High Court did not point out the provisions which were "indistinguishable in substance though varied in form" from those in the United States constitution, and the court held that it was extremely difficult to understand the application of the principle involved unless the applicability could be made clear by a comparison of the provisions of the two constitutions.

Having pointed out the complete failure of the analogy between the two states, because of the ease with which the Australian Constitution could be amended, and because of the power of the Crown to disallow questionable legislation passed by either the State or Federal Parliaments, the Judges further held that it was impossible to rely on the American decisions, as such reliance had resulted and would further result in overriding sections 106 and 107 of the Commonwealth of Australia Constitution Act which provide that the Constitution of each State shall continue at the establishment of the Commonwealth until altered in accordance with the Constitution of the State,

and that every power of the Parliament of a colony which becomes a State shall, until it is by the constitution of the Commonwealth exclusively vested in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.

As the decision of the Privy Council was, indeed, in accordance with the interests of the States, it was to be expected that the State courts, in passing on the applicability of the State income tax acts to Federal officers, would follow this decision of the Privy Council rather than that of the High Court in D'Emden v Pedder; and again it was to be expected that the plaintiffs, in their appeal, would appeal to the High Court whose decision had been favorable to their interests in declaring their salary as Federal officers exempt from the State income taxes. Precisely the latter situation presented itself to the High Court in 1907 in the case of Baxter v Commissioners of Taxation (1). Action had been taken in the District Court of New South Wales to recover an income tax on the salary of a Federal officer, in accordance with the Land and Income Tax Act passed by the Parliament of New South Wales in 1895. The defendant claimed exemption from liability on the ground that he is a Federal officer and that the taxation of his salary as such officer was an interference with the free exercise of the powers of the Commonwealth within the meaning of the rule laid down in

(1) (1907) 4 C.L.R. 1087.

D'Emden v Pedder, and therefore impliedly forbidden by the constitution. The Judges of the District Court, following the decision of the Privy Council in Webb v Outtrim, gave judgment for the plaintiff. Thereupon the defendant appealed directly to the High Court.

A minor question was raised in the High Court as to whether the District Court of the State was exercising Federal jurisdiction within the meaning of section 39 of the Judiciary Act of 1903, and if so, whether an appeal lay to the High Court by virtue of sub-section 2a of that section. The court held that the question raised by the defense was a question as to the limits inter se of the constitutional powers of the Commonwealth and a State within the meaning of section 74 of the constitution, and that the District Court was therefore exercising Federal jurisdiction under section 39 of the Judiciary Act of 1903, and that an appeal was competent by virtue of sub-section 2a of that section as well as section 73 of the constitution (1).

Upon the main question Justices Griffith, Barton, and O'Conner held that the High Court was by the constitution the final arbiter upon all such questions as to the constitutional

(1) Section 76 clause 1 of the constitution provides that "Parliament may make laws conferring original jurisdiction on the High Court in any matter arising under the constitution or involving its interpretation." Clause 39, sub-section 2a of the Judiciary Act of 1903 provides that "The several courts of the State shall, within the limits of their several jurisdictions, whether such limits are as to locality, subject matter or

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limits inter se of the powers of the Commonwealth and those of the States, unless it was the opinion of the Court that the question at issue in any particular case was one upon which the Court should submit itself to the guidance of the Privy Council. The Court therefore held that it was not bound to follow the decision of the Privy Council in Webb v Outtrim, but should follow its own decision rendered, after due consideration, in Deakin v Webb, where it had refused to grant a certificate under section 74 of the constitution to appeal to the Privy Council. The attitude of the Court is well summed up in the words of Chief Justice Isaacs when he says: "For the first time in the history of the British Empire a court has been established as to which it has been declared that no appeal shall be permitted from its decisions on certain questions unless the court itself certifies that the question is one which 'ought to be determined' by the Sovereign in Council. These words cast upon the Court the duty of determining whether the question is such a

(1) (continued) otherwise, be invested with Federal jurisdiction, in all matters in which the High Court has original jurisdiction or in which original jurisdiction can be conferred upon it..... subject to the following conditions: (a) Every decision of the Supreme Court of a State, or any other court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall be final and conclusive except so far as an appeal may be brought to the High Court. From this, then, it follows that an appeal lies to the High Court from the District Court. Section 73 of the constitution provides that "the High Court shall have jurisdiction ..... to hear and and determine appeals from all judgments etc..... of any other Federal court, or court exercising Federal jurisdiction; or any Supreme Court of any State, or any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council."

one or not, and if the court thinks that it is not it is its solemn duty to say so. If the case falls within section 74 of the constitution the Privy Council has no right to review its [the High Court] opinion on that point, and the fact that the Privy Council may be called upon to deal with the same question in another case is quite irrelevant to the opinion of this Court as to whether it ought to be determined by that Court or not..... Apart from any consideration of history, the words of section 74 are clear and strong enough to lead to the conclusion that on questions coming under the section, the decision of the High Court is final and therefore the Court has a right to decline to follow the decision of the Privy Council upon any such question..... It appears to us that these considerations show that the High Court was intended to be set up as an Australian tribunal to settle questions of purely Australian domestic concern, without review, unless the High Court in the exercise of its own judicial functions, and upon its own judicial responsibility, forms the opinion that the question at issue is one on which it should submit itself to the guidance of the Privy Council. To treat a decision of the Privy Council as over-ruling its own on a question which it thinks ought not to be determined by the Privy Council, would be to substitute the opinion of that body for its own, which would be an unwarranted abandonment of the great trust reposed in it by the constitution."

The Court argues further that as the constitution made

the High Court supreme in questions of constitutional rights of the States and the Commonwealth, unless it chose to permit a reference to the Privy Council, the Privy Council should have considered itself bound when a case came to it direct from the State court to accept the decision of the High Court.

The refusal of the High Court to follow the decision of the court which had, up to this time, been looked up to as the final source of colonial justice, left the judicial situation in Australia in a rather chaotic condition. It is true that such a situation had not arisen before, but it is further true that the point as to which, the High Court of the Privy Council, was the final arbiter as to colonial disputes under section 74 of the constitution had not been settled in the drafting of the constitution. Clause 74 which limits ~~for the first time~~ the right of appeal from the Colonial courts to the Privy Council was the result of a compromise (1), and represented a much smaller diminution of the privilege of the Crown to permit appeals than was originally contemplated in the Constitution Bill as presented to the Imperial Government by the delegates from the colonies, as has been shown in our previous discussion (2). It would be undesirable to go at length into the drawing up of the compromise, but it is interesting to note that the point at issue here was left unsettled. While the Constitution Bill was

(1) Compare notes on pages 6 and 9 supra.
(2) See pages 6 to 9 supra.

being debated in the House of Lords, it was pointed out by Lord Russell of Kollowen, among others (2), that though there was no appeal according to section 74 of the constitution from the High Court to the Privy Council, except as the former court should grant special leave, there still existed an appeal to the Queen in Council directly from the State Courts (2), and thereupon arose a conflict, since it might be held that the decision of the High Court, in matters in which no appeal lay from the High Court to the Queen in Council, should be regarded as equally final as the decision of the Privy Council in cases taken directly from the State Courts. Mr Haldane also, in the House of Commons, contended that there was reasonable ground for the contention that the clause as it now stood created the High Court as final an authority in these matters as the Privy Council, and this gave rise to the possi-

(1) Commonwealth of Australia Constitution Bill Debates (Wyman's) pp. 25, 26, 109 (Lord Russell); 101 (Lord Davey); 67 (Mr Haldane); 113 (Lord Selbourne); 117 (Lord Alverstone); 85 (Sir R. Finlay). Cited from Keith's 'Responsible Government in the Dominions' p.266.
(2) This conflict would bave been avoided had the colonies accepted the amendment offered by Mr Chamberlain while the Bill was being discussed in the Imperial Parliament, when he offered for the first clause of section 74 the following words:"No question, however arising, as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, shall be capable of final decision except by the High Court, and no appeal shall be permitted to the Queen in Council from any decision of the High Court in any such questions unless by the consent of the Executive Government or Governments concerned, to be signified in writing by the Governor-General in the case of the Commonwealth, and by the Governor in the State". Here no appeal could have been taken to the Privy Council under any circumstances without the Commonwealth's consent, thus avoiding all possibility of conflict.

bility of a conflict. On the other hand, Lord James of Hereford expressed very strongly his opinion that the decision of the Privy Council must and would prevail in such cases. He contended that such a decision was superior to that of any colonial court as it emanated from Her Majesty herself, the source of all justice, which she administered at home as well as abroad. Lord Davey expressed the same opinion as Lord Russell of Killowen, but the opinion expressed by Lord James of Hereford was endorsed by the Earl of Selbourne and very energetically by Lord Alverstone in the Lords, and Sir R. Finlay in the Commons, and their opinion was apparantly accepted as correct by the two houses. It is thus evident that there was a divided opinion as to the exact meaning of section 74 of the constitution; the colonies thinking that the clause prohibited all appeals to the Privy Council, from the State and Federal courts alike, thus making the High Court the final court of appeal in all colonial cases; many of the members of the Imperial Parliament, on the other hand, construing it to mean that appeals from the High Court alone were prohibited, leaving the appeal directly from the State Supreme Courts intact, thus leaving the Privy Council the final court of appeal in cases coming directly to it from these State courts.

With the situation as has been presented it was absolutely necessary that some action should be taken to avoid further trouble; two decisions had been rendered on the same question, one by the High Court, the other by the Privy Council, and though

their decisions were directly antagonistic, each contended that its decision was final. As the courts had thus taken their final stand, the only avenue of escape that remained was through some legislative enactment, and such an enactment was suggested by the High Court in the case of Flint v Webb (1). It was suggested by the Chief Justice that the inconvenience caused by the existance of the contradictory pronouncements by the Privy Council and the High Court could be removed by the Parliament of the Commonwealth exercising its power under section 77, subsection 2 of the constitution (2), which provides that Parliament shall have power to define the extent to which the jurisdiction of any Federal court shall be exclusive of those of the States, while he also suggested that the Commonwealth Parliament could especially provide that salaries paid to its officers by the Commonwealth should be subject to the right of the States to tax them. The suggestions in question were thought to be the only reasonable way of getting rid of a difficulty which landed all concerned in an absurd position. Accordingly there was introduced in the session of 1907 an Act to amend the Judiciary Act of 1903 (3). The important clause of this Act was

(1) (1907) 4 C.L.R. 1178.
(2) Section 77, sub-section 2 provides that "With respect to any of the matters mentioned in the last two sections (which include matters involving the interpretation of the constitution) the Parliament may make laws defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States."
(3) No. 8 of 1907.

the second which provided that "in matters (other than trials of indictable offenses) involving any question however arising as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, the jurisdicion of the High Court shall be exclusive of the jurisdiction of the Supreme Courts of the States so far as that the Supreme Court of a State shall not have jurisdiction to entertain and determine any such matter, either as a Court of First instance or as a Court of Appeal from an inferior court."

Section five of the same Act further provided that "when in any case pending in the Supreme Court of any State there arises any question as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the constitutional powers of any two or more States, it shall be the duty of the Court to proceed no further in the cause, and the cause shall be, by virtue of this Act, and without any order of the High Court, removed to the High Court."

This Act does not deprive the appellant in a State Supreme Court of the right assured to him by the royal prerogative of appealing from any final decision whatever of such a court, but it does secure that no State Supreme Court shall ever give a decision on any matter involving the rights inter se of the Commonwealth and those of any State or of any two States, by

providing that any case in which such issues are raised shall at once be transferred to the High Court, when of course the clause of the constitution limiting appeals to the Privy Council from the High Court will come into operation. The device was ingenious and terminated a situation which threatened to become detrimental to the welfare of the Commonwealth.

As a matter of fact this was the only road open to a practical solution of the judicial deadlock. The only other alternative that might be suggested would be the enactment of a law forbidding an appeal ~~directly~~ from the Supreme Court of a State directly to the Privy Council, but this, as is indicated by the dictum in Webb v Outtrim, would be held ~~as~~ ultra vires by the Privy Council as an interference with the rights guaranteed by the State constitutions. It might then be said that the Commonwealth Parliament here did indirectly what it could not do directly, and this is indeed true, but such action was warranted, as suggested by the High Court in Flint v Webb, under section 77 of the Constitution Act which gives Parliament the power to make laws "defining the extent to which the jurisdiction of any Federal Court shall be exclusive of that which belongs to or is invested in the courts of the States."

Although this enactment satisfactorily solves the problem at hand, there still remains a possibility of a conflict arising between the decisions of the Privy Council and the High Court on the same question. According to the provisions of the

Imperial statute regulating appeals from the Colonial courts to the Privy Council (1), the Privy Council is not compelled to require that every case shall go to the Supreme Court of a State before an appeal can be allowed to the King in Council, and it is thus still open to the Privy Council to give special leave to appeal in constitutional questions from any court of a State exercising Federal jurisdiction inferior to the Supreme Court. The Commonwealth Parliament could eliminate this possibility of conflict, however, by making the limitation to the subject matter in which the Supreme Courts have no jurisdiction applicable to all the State Courts exercising Federal jurisdiction. Although this possibility of conflict exists, it is improbable that the remedy will ever need to be applied as the liklihood of the Privy Council granting an appeal from the lower State courts is very small (2).

Thus the constitution of the Australian Commonwealth, as supplemented by statutory amendments, deprives the Privy

(1) 7 & 8 Vict. c 69.
(2) Keith in his article in the Journal of Comparative Legislation, vol. 20 (N.S.) p. 278, holds that there is still a possibility of appeal, and hence of conflict, by special leave from the decision of the High Court in constitutional questions to the Privy Council, but he does not substantiate his statement to that effect, nor does the authority to which he refers sustain this conclusion. Of course the power of appeal by special leave from the High Court to the Privy Council remains in all but constitutional questions, but it is generally held by other authorities that no such power of appeal exists in matters involving conflicts as to constitutional powers between the States and the Commonwealth, these conclusions being based on the prohibition in section 74 of the constitution.

Council, as well as the State Supreme Courts, of all judicial control in constitutional questions rising as a result of conflicts involving disputed Federal and State powers. As a consequence, then, the Federal High Court is the highest judicial tribunal in the Commonwealth, and acts as the final arbiter in all questions arising as to the limits inter se of the constitutional powers of the Commonwealth and a State, or as to the limits inter se of the constitutional powers of any two or more States, being the final court of appeal in constitutional questions, not only from all the inferior Federal courts, but from the State courts as well, and thus has the final power to declare State laws unconstitutional (1).

(1) However, throughout the remaining portion of this paper when the High Court is spoken of as being the final arbiter in all constitutional questions, it must be borne in mind that the possible appeal from the lower State courts directly to the Privy Council still remains, and that the Privy Council could, by special leave, grant permission for such an appeal even in such constitutional questions as have been mentioned above. Up to the present time, however, no effort has ever been made to obtain such an appeal, and it is quite improbable, although possible, that such an appeal will ever be permitted.

CONTROL OVER LEGISLATION OF THE COMMONWEALTH.

Although the courts in Australia had, as an exercise of their judicial functions, interpreted the Federal Constitution as to the limitation of the States' field of legislation as early as 1904 in the case of D'Emden v Pedder, there was no occasion for them to exercise the same function in respect to the Commonwealth Parliament till the first of the Union Label Cases arose in 1906 (1). In 1904 the Federal Parliament passed the Commonwealth Conciliation and Arbitration Act which provided for the regulation of associations of laborers, and further provided that all labor disputes arising between such associations and their employers should be settled by the Commonwealth Court of Conciliation and Arbitration, established in accordance with section 51 (xxxv) of the constitution (2). In accordance with the provisions of this act, the New South Wales Railways and Traffic Employees Association, an association of employees on the State railways of New South Wales applied to the registrar of the Commonwealth Court of Conciliation to be registered as an organization under the Commonwealth Conciliation and Arbitration Act of 1904. The application was opposed by the Federated Amalgamated Government Railway and Tramway Service Association, but was granted by the registrar. From this decision the plaintiffs

(1) Federated Amal. Govt. Ry and Trmy. Assn v N.S.W. Ry Traffic Employees Assn. 4 C.L.R. 488.
(2)"Parliament shall have power to make laws for the peace **** of the Commonwealth with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

applied to the president of the Commonwealth Court of Conciliation and Arbitration. One of the grounds of appeal was that the applicant association being an association of the State railway servants, could not be registered under the Act, and that the Act, in so far as it purported to include State railway servants within its provisions, was ultra vires and void. As the question here was a question of law, the case was stated by the President of the court for the opinion of the High Court, as was provided by the Act. The States of New South Wales and Victoria, which intervened in the case by permission of the High Court, contended that the provisions of the Act, so far as they would operate, if effectual, to interfere with the free State control of the State railways, were not authorized by the provisions of section 51 (xxxv) of the constitution, which empowers the Parliament of the Commonwealth to make laws for the peace, order, and good government of the Commonwealth with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State" because, they said, those general words ought not to be construed so as to import coercive control over State instrumentalities.

In detrmining the vital point at issue the court held that "the question to be determined is primarily one of the construction of a written document. If the power which the Commonwealth Parliament has asserted its right to exercise is conferred

by the constitution, as properly construed, the duty of the court is to say so. If, on the contrary, that instrument does not confer the power, we are bound to refuse to give any effect to the attempted legislation." The court after due consideration of the whole question upheld the argument of New South Wales and Victoria, and further declared that the rule laid down in D'Emden v Pedder (1) was reciprocal. It was held that attempted interference by the Commonwealth with the powers reserved to the States was invalid, and that when the Commonwealth attempted to give to its legislative or executive authority a power which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the States, the attempt, unless expressly authorized by the constitution of the Commonwealth, was to that extent invalid and inoperative. As the Court was agreed that a State railway was a State instrumentality, and hence under the exclusive jurisdiction of the State, it was held that the Commonwealth Conciliation and Arbitration Act of 1904, so far as it purported to effect the State railways, was ultra vires and void, and consequently that an organization consisting solely of employees of State railways was not entitled to be registered under the Act.

Here for the first time the High Court declared unconstitutional an act passed by the Commonwealth Parliament, a coordinate legislative body. If we ask from whence this power

(1) 1 C.L.R. at page 111.

came we shall hardly find an answer in any specific provision of the constitution itself, for we find no provision that expressly grants this power, nor shall we find the explanation in the essential nature of the Federal principle. It is indeed obvious that where there are two legislative authorities in a state which have enunciated irreconcilable rules of conduct, one must be paramount, but the power to investigate and interpret such conflicting statutes does not necessarily arise as an incident of judicial power, nor do courts as such, even though they interpret the statutes in cases demanding interpretation, necessarily have the power to declare unconstitutional the acts passed by a legislature, which conflict with the constitution of the state. In other words, the legislature is, under many written constitutions, the final interpreter of its own powers (1). A system under which the courts have authority to determine what is a valid exercise of the legislative power exists only in few nations, and is not one of the cardinal features in the constitutional form of government but is an extraordinary one.

It seems that three factors have coöperated to vest the power of judicial supervision over legislation in the High Court of Australia. The first is the implication that may be drawn from section 74 of the constitution. This section makes the High Court the final arbiter in all questions as to the limits inter se of the constitutional powers of the Commonwealth

(1) The German Judiciary. J.W. Garner, Pol. Sci. Quar. Vol 18, page 512.

and the States. In exercising this power the High Court must pass ~~its~~ judgment on the validity of claims presented by the Commonwealth and the States when a question arises as to their respective constitutional powers, and reject such claims of power of the Commonwealth as well as those of the States as it thinks invalid (and hence declare unconstitutional all Acts passed under such assumed powers). For if the High Court did not have power to declare unconstitutional Federal laws encroaching on the powers reserved to the States, it would cease to perform the functions of a mediator and become merely a functionary to determine when the States encroached on the Federal field of legislation. It is hardly credible that such was the meaning intended to be conveyed in section 74 of the constitution.

The second factor is the heritage that the High Court received from the Privy Council. At the time of the framing of the Australian constitution and at the time of its discussion in the Imperial Parliament, it was the contention of the delegates that all domestic disputes as to the respective powers of the State and Commonwealth legislatures should be settled within Australia. Consequently at the establishment of the Commonwealth the High Court in Australia took, to a great extent, the place formerly occupied by the Privy Council, and as the Privy Council had been the final judge of the constitutionality of colonial legislation, it is not an unreasonable inference that the High Court inherited this power.

The third factor in establishing the power of the High Court to exercise a judicial control over legislation has been the fact that the clauses providing for the Federal judiciary in Australia were adopted, to a great extent from the constitution of the United States (1). If, then, provisions were adopted in the Australian constitution providing for a judicial organization similar to that of the United States, it is not an unwarranted assumption that it was the intention of the framers of this document that the courts in Australia should exercise the same control over legislation as that exercised by the courts in the United States (2).

It is difficult to judge just how much each of the factors contributed, but it is undeniably true that they collectively have given the High Court the power to maintain its position as the final arbiter in all questions involving the constitutionality of Federal legislation. It has thus been recognized that the High Court has the power to exercise its control over Federal legislation, and to serve as the guardian of the constitution. It was this power, then, which the court was exercising in the State Railway Servants Case.

(1) Compare the following provisions from the Australian and United States constitutions:-

Australia	United States	Australia	United S.
Section 71	Article III, sec 1	Sec. 76	Art III sec 2
" 72	" III, " 1	" 77	
" 73	" III, " 2	" 78	Amendment XI
" 74		" 79	
" 75	Article III, sec 2	" 80	Amendment X

(2) To the High Court, then, would fall the power first exercised by the Supreme Court of the United States in McCulloch v Maryland.

A situation similar to that in the State Railway Servants Case presented itself, and the High Court was again called upon to guard the constitution against Federal encroachment on State rights, in the case of Attorney-General of the State of New South Wales v Brewery Employees Union of New South Wales (1). This case arose under Part VII of the Trade Marks Act of 1905, which provided for the registration and protection of workers trade marks. As this portion of the statute made no distinction between purely domestic and inter-state employments, it was attacked on the ground of Federal interference with purely domestic affairs of the States. It was argued that if the Federal Government had power to carry out the provisions of this portion of the Act, it might refuse to register the mark of intra-state associations of laborers unless certain specifications as to the laborers, or conditions of labor had been complied with. Employers as well as employees might thus be compelled to fulfill certain conditions as to labor prescribed by the Federal Government in order to obtain the advantages gained by competitors who had complied with these conditions. In this way the Federal Government might control domestic trade and commerce indirectly which it could not control directly. The court sustained the arguments of the plaintiffs, holding that the mark provided for in this portion of the Act was not a trade mark in the sense in which this term was used in the constitution, over which the Commonwealth Parliament had been given complete super-

vision; and that this part of the Act was in substance an attempt to regulate the purely domestic conditions and internal trade of the States.

The Court further held that it was a necessary implication from paragraph 1 of section 51 of the constitution (1) that the power of Parliament does not extend to the trade and commerce within the States, and that, consequently, the power to legislate as to internal trade is reserved to the States by section 107 of the constitution which provides that every power of the Parliament of a colony which has become a State, shall, unless it is exclusively vested by the Federal constitution in the Parliament of the Commonwealth, or withdrawn from the Parliament of the State, continue at the establishment of the Commonwealth. In conclusion the Court again asserted the principle which it had established in Regina v Barger (2), when it declared a Federal excise tax law unconstitutional as interfering

(1) Sec. 51, par. 1: "The Parliament shall * * * have power to make laws for the peace * * of the Commonwealth with respect to * * * commerce between the States."
(2) 6 C.L.R. 41. This case, in which the Federal statute in question attempted, by means of taxation, to regulate conditions of labor in the States, bears a close analogy to the case of McCray v United States (195 U.S.27) where the statute attacked was a Federal tax law enacted for the purpose of indirectly prohibiting the manufacture, within the States, of certain adulterated articles; but the conclusions reached by the courts in the two cases are directly opposed. In both cases taxation was employed as a means to accomplish an end indirectly which was not within the power of the Federal Governments to accomplish by direct legislation. The Australian statute involved in Regina v Barger bears an even closer analogy to the United States statute passed in 1912, which virtually forbids the manufacture of phosphorus matches within the States, by imposing upon them a prohibitive excise tax.

with the internal affairs of the States, in saying that when the intention to reserve any subject matter to the States, to the exclusion of the Commonwealth clearly appears, no exception should be admitted to that reservation which is not expressed in clear words. Part VII of the Act was therefore held to be invalid, and though its provisions, if limited to trade and commerce between States, would have been within the competency of the Commonwealth Parliament, yet as it was impossible to separate that which was within from that which was without the power, the whole was held invalid.

More emphatically in Huddard Parker v Moorehead (1), Chief Justice Griffith, in deciding on the applicability of the Australian Industrial Preservation Act to corporations engaged in the domestic trade of a State, declared that the constitution "is to be construed as if it contained an express declaration that the power to make laws with respect to trade and commerce within the limits of a State, and not relating to trade and commerce with other countries and among the States, is reserved to the States, except so far as the exercise of that power by the Commonwealth is necessary for or incidental to the execution of some other power conferred on the Parliament of the Commonwealth."

The action of the High Court in these cases aroused a very spirited feeling of dissatisfaction among those classes

(1) 8 C.L.R. 330 at page 352.

most closely affected by such action. In as much as the power of the High Court to declare laws unconstitutional was well established by the numerous cases in which this power had been exercised by the court (1), the only remedy that might be sought was the changing of the constitution so as to give the Federal Parliament power to regulate the internal trade and commerce of a State, and in this way overcome the effect of the judicial decisions by constitutional changes. This was attempted in 1911 when two constitutional changes were proposed. The first of these suggested amendments proposed to change section 51, paragraph 1 so as to give the Federal Parliament complete power to regulate commerce; paragraph xx of the same section, so as to give the Federal Parliament complete power to control corporations, domestic and foreign; and section 51, paragraph xxxv so as to give the Federal Parliament complete supervision over all labor disputes and conditions. In addition a paragraph xxxx was to be added to section 51 extending Federal power over "combinations and monopolies in relation to the production, manufacture, or supply of goods or services." The second amendment would have added a new section 51a to the constitution which read as follows:"When each house of Parliament, in the same session, has, by a resolution, declared that the industry

(1) Amal. Govt. Ry. & Trmy. Serv. Ass'n v N.S.W. Ry etc 4 C.L.R. 488.
King v Barger 6 C.L.R. 41.
A-G of N.S.W. v Employees Union 6 C.L.R. 469.
Huddard Parker v Moorehead 8 C.L.R. 330.
Australian Boot Trade Employees Ass'n v Whybrow 10 C.L.R. 266

or business of producing, manufacturing, or supplying any specified goods, or supplying any specified services, is the subject of a monoply, the Parliament shall have power to make laws for carrying on the industry or busines by or under the control of the Commonwealth, and acquiring for that purpose on just terms, any property used in connection with the industry of business." These proposed amendments passed both houses of Parliament in 1910 and were submitted to the vote of the people in 1911. The majority of the people recognized, however, that the proposed amendments would very greatly increase the powers of the Federal Government at the expense of those of the States, and as a result the measures were defeated in the referendum.

As we have seen, attempted legislation by the Australian Parliament which deals wholly with matters not within the power of that legislative body, or by which the Federal Parliament exercises a power in a forbidden way, will not be enforced by the courts (1). But it very commonly happens that a statute merely trenches on the forbidden ground, among other

(1) It must be remembered that the power of disallowance by the Crown also remains. The Governor-General, in case of the Commonwealth enactments, may use his discretion in assenting to, withholding assent from, or reserving bills presented to him for his assent in the name of the Crown. In case of a State enactment this power is reserved to the Governor. But even after the Governor-General or Governor respectively has assented to a law, the ultimate power of disallowance is, by the constitution, reserved to the Crown, subject only to the condition that the right of disallowance must be exercised within a year in case of the Commonwealth (sec. 59 of the constitution) and within two years in the State, after the Governor-General's or Governor's assent. There can be no doubt that the reserved power of disallowance has been, and will

things which, if taken by themselves, would be within the power of the Parliament. The question in such cases is how far the taint extends, for it is well settled that a statute may be unconstitutional in part only (2). The test of the constitutionality of a part, as held by the courts, is the severability of the subject matter dealt with. The question that must be put then is, is the scheme of forbidden legislation part of and interwoven with the lawful scheme so that the elimination of the first makes the second incomplete or substantially alters its nature. If so, to sustain the second in absence of the first would be to convert the scheme into something other than Parliament devised, and to establish a substitute scheme for the scheme of the legislature. The principle has become recognized in Australia, that when it is once established that some part of an Act of Parliament is invalid, the ordinary presumption then is that the whole Act constituted a single scheme, and it must be shown affirmatively that there is such an independence of parts as will enable what remains to be sustained (3).

be sparingly exercised, in accordance with the rule long established, that the Imperial Government refrains from interfering with any colonial legislation which is consistent with colonial constitutional law, except in cases involving Imperial and international relations. As the writer does not have access to the State statutes he is not in a position to state to what extent the power of disallowence has been exercised in respect to State statutes, but in respect to Commonwealth statutes we have evidence that up through 1910, no statute has been disallowed, or even reserved for the royal assent or disallowence.

(2) See Baxter v Commissioners of Taxation, 4 C.L.R. 1087.

(3) A-G of N.S.W. v Brewery Employees Union of N.S.W. 6 C.L.R.469 See judgment of O'Conner 545-548; Isaacs 559.

In the Union Label Case (1) the court held that the provisions of Part VII of the Trade Mark Act of 1905, establishing a workers' mark, were ultra vires as invading the State power over domestic commerce and industry. It was argued that as Part VII contained a distinct and specific prohibition of the importation of goods to which the workers' label had been applied without authority, and that as this provision if it stood alone would be clearly within the power of the Commonwealth Parliament over foreign trade, this provision should be separated from the rest of Part VII and sustained. The court rejected the contention on the ground the the result would be to bring into operation a law entirely different in its purpose and character from that which the Legislature enacted.

On the other hand, in Baxter v Commissioners of Taxation (2), the court had to deal with section 39 of the Judiciary Act of 1903 whereby Federal jurisdiction was committed to the State courts subject to various conditions, one of which was that every decision of the Supreme Court of a State exercising jurisdiction under this section ahould be final and conclusive except so far as an appeal might be brought to the High Court. It was argued that, assuming that the condition was ultra vires as excluding an appeal to the Privy Council, the grant of Federal jurisdiction to the State courts was so dependent on this matter of

(1) 6 C.L.R. 469.
(2) 4 C.L.R. 1087.

of appeal as to invalidate the whole scheme contained in this section. The court, however, held that the provisions were separable and independent. If the provisions in question were constitutional, an appeal would lie to the Privy Council by special leave; if they were unconstitutional an appeal would lie without special leave. The validity of the grant of Federal jurisdiction on the State courts could not be regarded as dependent on such a subsidiary question as the different possibilities of appeal.

The most difficult class of cases with which the courts are compelled to deal is where the statute uses terms of generality, which, if literally construed, would apply the act to matters beyond the power of the legislature. It has been the policy of the court, as stated by Justice Isaacs in the State Railway Servants Case (1), to refrain from deciding on the constitutionality of a law unles absolutely necessary to decide the case. Likewise the Court has given general terms of the Acts passed by Parliament the benefit of a favorable interpretetion, holding that Parliament intended that the Act should not extend beyond the limits of its legislative power. An example of such interpretation is the decision of the Jumbunna Case (2), where the general words sustained were found in a Commonwealth enactment which was plainly referable to the constitutional power of the Commonwealth Parliament over industrial disputes extending beyond

(1) 6 C.L.R. 469.
(2) 6 C.L.R. 309.

the limits of any one State, in that the association of miners seeking to be registered under the Federal statute might become involved in controversies extending beyond the limits of the State in which they actually performed their work, and the presumption was that Parliament intended its words to operate within the limits of that power. Although the courts will give the enactment of a legislature the benefit of every reasonable doubt, yet the court will not act as a constructive agency in cases where the legislature bases the attempted legislation on no particular constitutional provision, but leaves to the court the task of finding some power of the Parliament to which the words can be applied in a restricted sense. This was the attempt which failed in the State Railway Servants Case, where the Act itself had no apparant relation to inter-state commerce,and where, therefore, there was no reason to suppose that Parliament intended that its general words should be applied to inter-state commerce only.

SUMMARY.

As we have thus traced the constitutional development in Australia, we may come to the conclusion that the established courts of justice, when a question arises as to whether the prescribed constitutional limits have been exceeded, must determine that question; and the only way they can properly do this is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they were restricted. If what has been done is within the general scope of the affirmative words which give the power, and if it violates no express condition by which that power is limited (in which category would of course be included any Act of the Imperial Parliament at variance with it), it is not for any court of justice to interfere further, or to enlarge constructively those restrictions and conditions. If on the other hand the attempted legislation exceeds such conditions and restrictions, it is the duty of the court to point out such transgressions, and refuse to enforce such an enactment (1).

This judicial control existed and was exercised in a small degree before the formation of the Federation in all the colonies having responsible government, notably in the early days of this form of government in South Australia (2). As the Imperial Acts which constituted the constitutions of the differ-

(1) The Queen v Burah. 3 App. Cas. 889.
(2) Powell v Apollo Candle Co. (1885) 10 A.C. 283.
Slattey v Naylor. (1888) 13 A.C. 446.

erent colonies retained their original force at the adoption of the Federal constitution, the State courts continued, after the organization of the Commonwealth, to exercise this power when their laws were attacked on State constitutional grounds (1). But because of the amendment in 1907 to the Judiciary Act of 1903 such powers of the State courts in respect to State laws when attacked on the ground of transgressing the limits inter se of the State and Federal powers, have been transferred to the Federal High Court. When such constitutional questions are passed upon in the High Court, the States may intervene and contend for their rights and interests, but their Supreme Courts can no longer pass upon cases involving such constitutional questions. The State courts retain the power, however, to pass upon the constitutionality of laws which may be impeached as transcending the limits imposed by the State constitution, but which do not infringe on the rights of the Commonwealth, or involve the question as to the limits inter se of the State and Federal powers.

From the previous discussion it will appear clear that the courts in Australia have the power to pass on the constitutionality, not only of the legislation passed by the State Parliaments (2), but of that passed by the Commonwealth Parliament as well (3). But here we must note a great contrast between the record of the High Court and that of the ~~Supreme Court of the~~

(1) Webb v Outtrim. supra.
(2) D'Emden v Pedder 1 C.L.R. 91 ; see also 1 C.L.R. 619; 4 C.L.R. 1087.
(3) A-G of N.S.W. v Brewery Employees Union 6 C.L.R. 469. See also 4 C.L.R. 488.

Supreme Court of the United States. The High Court has exerted its power in judicial control but sparingly, while it seems that the Supreme Court of the United States has carried this practice to the extreme. This is probably due, not so much to the different spirit that prevails in the two courts, but to the absence in the Australian constitution of the broad and undefined guarantees whichare found in the American constitution. In the majority of the cases in which the United States Supreme Court exercises judicial control, the statutes are impugned on the ground of violating the "due process" and "equal protection" clauses of the Fourteenth Amentment. The Australian constitution, as has been stated, contains no such broad and undefined provisions, and the courts are compelled to interpret only the respective powers granted by the constitution to the Commonwealth and the States.

Although the Privy Council is the final court of appeal from the colonies, and has passed on the validity of Australian provincial enactments (1), in respect to the Commonwealth enactments it has had no occassion to exercise this power. This has been due, in cases involving conflicts as to the constitutional powers of the State and Federal governments, to the refusal of the High Court to grant special leave of appeal to the Privy Council as ispermitted by the first clause of section 74 of the constitution. In cases involving no such constitutional conflicts, in which the Privy Council can grant special leave of

(1) Webb v Outtrim 1907 A.C. 81: Slattery v Naylor (1888) 13 A.C. 446.

appeal from the decision of the High Court, as is provided by the third clause of section 74 of the constitution, even though a constitutional question is involved, the Privy Council has not been confronted with a petition for such leave of appeal in which the court thought that the question at issue demanded its action, and the result has been, as has been stated, that the Privy Council has never passed ~~its~~ judgment on cases involving the constitutionality of Federal enactments.

As we have ~~thus~~ seen, it is within the power of any court of law within the Commonwealth to entertain cases, and (with the exception of the Supreme Courts of the States when conflicts as to constitutional powers of the States and the Federal government are involved) to decide upon the validity of a particular statute, or provision of a statute which has been impeached. The judgment of a lower court is of course open to appeal and is liable to be reviewed and annuled by a court of superior jurisdiction, whose decision likewise may be examined and adjudicated upon by the courts of final appeal. By this process a final authoritative decision can be obtained in respect to any State or Federal enactment, from the highest legal tribunal in the Commonwealth, and in some cases, in the Empire.

It might be well then in closing to state briefly the present situation as to judicial control in Australia. The State courts have the power to decide on the validity of State statutes when no question as to the limits inter se of the

Commonwealth and State constitutional power is involved. In cases involving conflicts between State and Federal powers, or in cases where the State law is alleged to conflict with the Federal constitution, the State Supreme Court has no power to decide on the validity of the statute involved, because of the amendment to the Judiciary Act of 1903, as has been stated above, although theoretically the lower State courts retain this power. The High Court, then, is not merely a Federal court, but a National court. It extends not only to all decisions of the courts of original Federal judisdiction, but also to the decisions of the Supreme Courts of the States, and is thus the final arbiter as to the constitutionality of all State and Federal enactments. Because of the amendment of 1907 to the Judiciary Act of 1903, the Privy Council plays a very small part in determining the validity of State and Federal enactments. It exercises this power only where special leave of appeal is granted by the High Court from its decisions in cases involving a conflict as to the constitutional powers of the State and Federal governments, or where, in all other constitutional cases, the Privy Council itself grants special leave of appeal. However it must be remembered that the possibility of appeal from the inferior State courts directly to the Privy Council still remains even in questions as to the limits inter se of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits of the constitutional powers of any two or more States.

If this situation should at any time prove undesirable to the Commonwealth it could easily be remedied by a Commonwealth enactment which made ~~made~~ the present restrictions as to the jurisdiction of the State Supreme Courts applicable to the inferior State courts as well. Up to the present time, however, no such appeal has been permitted, and it is improbable that the Commonwealth will ever need to resort to the remedy suggested as it is unlikely that the Privy Council will ever permit such an appeal.

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